

EMPLOYER STATUS DETERMINATION
OmniTRAX, Inc.

This is the determination of the Railroad Retirement Board concerning the status of OmniTRAX, Inc. (Omni) as an employer under the Railroad Retirement Act (45 U.S.C §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.) (RUIA).

Information regarding Omni was provided by Michael Ogborn, Managing Director for Omni. Omni, a privately held corporation owned and controlled by Mr. Patrick J. Broe, was incorporated on March 4, 1993. Mr. Dwight N. Johnson is CEO of Omni. Omni began operations July 1, 1993. Mr. Ogborn states that Omni provides management, accounting, marketing, public relations, and acquisitions support to its clients.

In Interstate Commerce Commission (ICC) Finance Docket 32531, decided July 6, 1994, Patrick Broe and Omni were granted an exemption to effect a reorganization under which 11 carriers formerly controlled by Mr. Broe would become subsidiaries of Omni; however, Mr. Broe would continue to be in control of Omni.

On August 10, 1994, Omni entered into agreements with its subsidiaries: Central Kansas Railway, Limited Liability Corporation [CKR], Chicago Rail Link, LLC [CRL], Great Western Railway Company of Iowa, LLC [GWRI], Panhandle Northern Railroad [PNR], Kansas Southwestern Railway [KSW], Newburgh & South Shore Railroad, LTD [NSR], Great Western Railway of Colorado, LLC [GWRC], Manufacturers' Junction Railway, LLC [MJ], and Chicago West Pullman & Southern Railroad, LLC [CWP&S], all of which are covered employers under the RRA and the RUIA. Omni provides accounting, management and staffing services to its subsidiaries.

Section 1 of the RRA defines an employer to include the following:

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of Title 49;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad....[45 U.S.C §231(a)(1)(i) and (ii)].

Section 1 of the RUIA (45 U.S.C. §351) and section 3231 of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. §3231) contain essentially the same definition.

Omni is not an employer by railroad within the meaning of section 1(a)(i) of the RRA. Accordingly, it would be a covered employer only if it falls within the meaning of 1(a)(ii) of the Act. A recent decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the RRTA held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of section 3231 of the Internal Revenue Code. Union Pacific Corporation v. United States, 5 F. 3d 523 (Fed. Cir., 1993).

The facts in the Union Pacific case with respect to ownership and control are indistinguishable from those presented by Omni. Accordingly, a majority of the Board finds that OmniTRAX, Inc. is not and never has been an employer covered by the RRA and the RUIA because it is not under common control with its rail carrier subsidiaries.

Glen L. Bower

V. M. Speakman, Jr. (*Separate
dissenting opinion attached*)

Jerome F. Kever

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TO : The Board

FROM : Catherine C. Cook
General Counsel

SUBJECT: OmniTRAX, Inc.

As requested by the Assistants to the Chairman and the Management Member, we are re-submitting to you the recommended coverage determination concerning OmniTRAX, Inc. which was originally submitted under a cover memo of February 23, 1995. The decision concludes that OmniTRAX is not covered under the decision in Union Pacific Corporation v. United States, 5 F. 3d 523 (Fed. Cir. 1993). It has been modified to show that the Labor Member dissents in a separate written opinion and to include the amended definition of "employer" enacted in 1995 by P.L. 104-88.

Attachment

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